Supreme Court U.S.
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IN THE

# Supreme Court of the United States

October Term, 1980

No. 80-506

JEROME A. KAPLAN, PETITIONER

v.

RILEY POINTER and PAUL S. SHUPP,
RESPONDENTS

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## QUESTION PRESENTED

Whether the appellate court failed to follow this Court's holding in *Willingham* v. *Morgan*[1] when the appellate court *sua sponte* remanded to the local District of Columbia courts a case which had previously been removed from those courts and in which two employees of the General Services Administration (GSA) sued a GSA official alleging that the GSA official had made threatening and harrassing telephone calls to them despite the fact that:

1) the GSA official's duties required him to oppose the grievances and Equal Employment Opportunity complaints filed by these two GSA employees;

2) the GSA official's only contact with the GSA employees arose from the performance of his duties as an officer of the federal government;

3) the GSA official asserted his official immunity as a defense to the suit;

4) the GSA official's petition removing the case to the federal district court under 28 U.S.C. § 1442(a)(1) together with the other pleadings in this case specifically alleged that his only contacts with the GSA employees had been in connection with his official GSA duties;

5) the GSA employees did not oppose the removal petition; and

6) the GSA employees had always alleged in prior proceedings that they were suing the GSA official for acts within the scope of his duties.

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[1] *Willingham* v. *Morgan*, 395 U.S. 402 (1969).

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Jerome A. Kaplan petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit in the above-captioned case.

## OPINIONS BELOW

Neither the United States Court of Appeals for the District of Columbia Circuit nor the United States District Court for the District of Columbia published an opinion in this action. A copy of the order of the District Court is attached hereto as Appendix A. A copy of the order of the Court of Appeals is attached hereto as Appendix B.

## JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 30, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

Section 1442(a)(1) of Title 28 of the United States Code provides:

> (a) A Civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> > (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

## STATEMENT OF THE CASE

On February 23, 1979, respondents Riley Pointer and Paul Shupp, two employees of GSA, filed a complaint in the Superior Court of the District of Columbia against petitioner Jerome A. Kaplan, a GSA official, alleging that Mr. Kaplan had made harrassing and threatening telephone calls to them. Out of this litigation, a critical

issue has emerged for resolution by this Court: the right of a federal official to remove from a local court to a federal court an action brought against him, when the record demonstrates that the official's contact with the plaintiffs arose solely in the course of the official's duties.

Petitioner Jerome A. Kaplan is a supervisory Labor-Management Specialist at GSA. His duties include serving as GSA's representative in all its dealings with the twenty-eight local unions representing workers in GSA's Washington, D.C., buildings, and supervising the investigation of grievances and Equal Employment Opportunity ("EEO") complaints.

Respondent Riley Pointer was employed by GSA until 1978 as a maintenance engineer. He also served as chairman of his union's local Grievance Committee. In that capacity, Mr. Pointer represented himself and other union members in connection with grievances as well as the prosecution of EEO complaints against GSA.

Respondent Paul Shupp is a watch foreman at GSA's Agricultural Field Office and was Mr. Pointer's immediate supervisor.

It is Mr. Kaplan's job to represent GSA in negotiations and arbitration hearings flowing from grievances brought by members of Mr. Pointer's local union (which is but one of twenty-eight for which Mr. Kaplan has responsibility). Mr. Kaplan also serves as GSA's representative in certain EEO cases. His role is to investigate the cases and to decide whether GSA should offer to settle. In those cases in which settlements are not reached, Mr. Kaplan represents GSA in the contested proceedings that follow. Mr. Kaplan had been Mr. Pointer's and Mr. Shupp's adversary in several contested proceedings. Occasionally, Mr. Kaplan spoke with Mr. Pointer by telephone to gather

information about their grievances or to work towards resolution of their complaints.

**1. The Telephone Calls.**

In February or March of 1975, Messrs. Pointer and Shupp began to receive anonymous telephone calls at their homes. The caller would identify himself by fictitious names such as "Big Mac from McDonalds." The caller's voice appeared to be disguised. Later, in April or May of 1975, the calls contained threats, such as: "This is Big Mac. We got a contract out on you." "This is Black Power. We have a contract out on you." "Go out to the cemetery and dig a hole and wait until we get there."

At an unspecified point in the summer of 1975, the telephone calls stopped coming to Mr. Pointer's and Mr. Shupp's homes. Instead, after a gap of about two to three weeks, Messrs. Pointer and Shupp began to receive similar calls at work.

As the months went on, the calls became much less frequent, until the last one was reported by one of respondents' co-workers on April 11, 1976, about a year after they had begun. During the year that the calls were made — and in the four and one-half years since — no actual attempt has been made to harm either Mr. Pointer or Mr. Shupp.

The Federal Bureau of Investigation, GSA, and the Civil Service Commission all attempted to establish the identity of the caller. No suspects were developed by any of the agencies, and the identity of the caller was never established.

## 2. Procedural History

### a. The First Suit in Federal District Court.

On April 21, 1977, Messrs. Pointer and Shupp filed a complaint in the United States District Court for the District of Columbia seeking four million dollars ($4,000,000.00) in damages. The complaint named seven defendats[2] including Mr. Kaplan. The complaint charged that Mr. Kaplan had made threatening and harrassing telephone calls to Messrs. Pointer and Shupp.[3] Two

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[2]The other defendants were all officers of GSA, starting with the Administrator and working down through the entire chain of command to plaintiffs' immediate supervisor. The United States Attorney assigned to represent all GSA officials perceived a potential conflict of interest between the defendants that he represented. If Messrs. Pointer and Shupp were able to prove their allegations, the conflict might have become actual. Further, if the allegations were proven, the United States might decide to prosecute Mr. Kaplan, which would be difficult or impossible if a United States Attorney had received confidential communications from Mr. Kaplan. Accordingly, the undersigned firm was retained by the Department of Justice to represent Mr. Kaplan. After three and one half years of litigation, Messrs. Pointer and Shupp have yet to prove their allegations but the potential conflict of interest remains. We have cooperated closely with the United States Attorney's office for the District of Columbia in the defense of this case and have consulted with that office about the filing of this petition. We note this background because in this context the Court may wish to solicit the views of the Department of Justice concerning the issues raised by this case.

[3]Mr. Kaplan denies that he made the calls. Interestingly, the allegation in the complaint that Mr. Kaplan made the calls is the only direct statement ever made by the defendants that Mr. Kaplan was the caller. On discovery, Mr. Pointer would only say that he had "a strong belief" (but no evidence) that Mr. Kaplan made the calls. Mr. Shupp was unable to identify the voice on the phone. During the more than one year of discovery, no witness could be found to testify that Mr. Kaplan made the calls. Not one of the many investigators (including GSA, FBI, CSC, and an independent examiner hired by GSA) has ever identified the caller. Messrs. Pointer and Shupp are evidently aware that they cannot be sued for defamation for statements made in

counts were stated: Count One alleged a *Bivens*[4]-type violation of Mr. Pointer's and Mr. Shupp's federal constitutional rights by the making of the calls (allegedly by Mr. Kaplan) and by the subsequent failure (by the other defendants) to investigate the matter of who was making the calls; Count Two alleged, under pendent jurisdiction, that the making of the calls amounted to the local common law tort of intentional infliction of emotional distress.

After a year of full discovery, defendants, including Mr. Kaplan, filed motions for summary judgment and dismissal. On January 12, 1979, the Honorable Thomas A. Flannery granted summary judgment as to six of the seven defendants. As to Mr. Kaplan, the district judge held that there was a factual dispute concerning whether Mr. Kaplan had made the calls.

Accordingly, the district judge denied Mr. Kaplan's motion for summary judgment but went on to grant Mr. Kaplan's motion to dismiss on the ground that Messrs. Pointer and Shupp had failed to state a violation of their federal constitutional rights. Respondents did not appeal the court's order.

The district judge's order of dismissal specifically reserved the right of Messrs. Pointer and Shupp to file a local action in the Superior Court of the District of Columbia alleging that the telephone calls amounted to the common law tort of intentional infliction of emotional distress.

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court; they have been careful never to repeat their assertion in any of the dozens of letters, complaints, grievances, and charges that they have filed.

[4]*Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971).

b. **The Second Suit in the Local District of Columbia Court: Grounds for Removal.**

Messrs. Pointer and Shupp subsequently filed a complaint in the Superior Court for the District of Columbia naming Mr. Kaplan only. The complaint charged Mr. Kaplan with the intentional infliction of emotional distress by means of the harrassing telephone calls and claimed two million dollars ($2,000,000.00) in damages.

Paragraph 10 of the Superior Court complaint alleged that:

> . . . Mr. Jerome Kaplan [is] Special Assistant to the Director, Management Operation [sic] Division, Public Building [sic] Service, Region 3, General Services Administration.

Paragraph 2 of the same complaint alleged Mr. Shupp's employment by the federal government. Paragraph 3 set forth Mr. Pointer's federal employment, adding that at the relevant times Mr. Pointer had been Chairman of the Grievance Committee of his local union and that he was in addition active in the prosecution of EEO complaints against GSA.[5]

The substantive acts alleged in the Superior Court complaint were acts that, if committed at all, would have arisen out of the relationship that Messrs. Pointer and

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[5]Messrs. Pointer and Shupp claim to have filed more than forty complaints against GSA. The files in these cases are so voluminous and duplicative that no one can say with certainty how many separate cases are involved. The actual number of separate complaints that resulted in formal proceedings is probably closer to twelve: seven for Mr. Pointer, and five for Mr. Shupp. Mr. Pointer has filed at least two new complaints since this litigation began, including one filed after he retired from government employment.

Shupp and Mr. Kaplan had by virtue of their mutual government employment. Since Mr. Kaplan was a federal official who had been sued for alleged acts committed under color of his office, he filed a petition to remove the case to federal court pursuant to 28 U.S.C. § 1442(a)(1).[6] Messrs. Pointer and Shupp did not oppose the petition, and the case was accordingly removed to federal district court.

c. **Litigation After Removal.**

In federal district court, Mr. Kaplan then moved for summary judgment on the ground that as a federal official he was absolutely immune to suit on a common law tort. *Butz* v. *Economou,* 438 U.S. 478, 495 (1978), *citing Barr* v. *Matteo,* 360 U.S. 564 (1959). On July 12, 1979, after receiving two *pro se*[7] oppositions from Messrs. Pointer and Shupp, the district judge granted Mr. Kaplan's motion and dismissed the case with prejudice.

Messrs. Pointer and Shupp appealed *pro se* to the Court of Appeals for the District of Columbia Circuit on October 2, 1979. The sole argument that they raised on appeal was that Mr. Kaplan's official immunity did not extend to the acts alleged in the complaint - threatening and harassing phone calls. Messrs. Pointer and Shupp did not argue that the case had been erroneously removed from

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[6]The removal provisions of 28 U.S.C. §1442 are made applicable to the District of Columbia by 28 U.S.C. § 1451.

[7]After removal to federal court had been effectuated, counsel to Messrs. Pointer and Shupp moved to withdraw, stating that the Superior Court complaint had been filed "solely to preserve the Plaintiffs' rights under District of Columbia law" and that "continued representation would reflect on [counsel's] professional competence and integrity." The district judge granted counsel's request to withdraw and permitted Messrs. Pointer and Shupp to proceed *pro se*.

Superior Court. Instead, they contended that if Mr. Kaplan had made the calls, he had acted on a frolic of his own; was therefore not acting within the scope of his official duties; and so was not immune to suit.

The Court of Appeals for the District of Columbia Circuit denied oral argument and on June 30, 1980, issued an order vacating the district court's judgment and remanding the case with directions that it be returned to the Superior Court of the District of Columbia. The grounds upon which the Court of Appeals based its judgment, none of which had been raised, briefed, or argued in the district court or in the court of appeals, were stated as follows:

> From the face of the record, and the representation in appellant's [*sic*] brief that appellee's alleged liability derives from acts outside the scope of his official authority, it appears that this case was not subject to removal from the Superior Court for the District of Columbia, *see* 28 U.S.C. § 1442(a)(1), and that the United States District Court therefore did not have jurisdiction to entertain it on removal.

(The actual judgment is reproduced in Appendix B.)

Mr. Kaplan argues to this Court that the Court of Appeals applied an erroneus standard for determining the appropriateness of removal and reached a conclusion that is in direct conflict with *Willingham* v. *Morgan, supra,* decided by this Court.

## REASONS FOR GRANTING THE WRIT

"This case raises some important questions about the power of federal officials to have actions brought against them removed to the federal courts." So began Mr. Justice

Marshall in his dispositive opinion in *Willingham* v. *Morgan*, 395 U.S. 402 (1969), which established the test for removal of civil actions under 28 U.S.C. § 1442(a)(1). So we begin now. The Court of Appeals for the District of Columbia Circuit failed to apply to our case the standard for removal formulated in *Willingham*.

### 1. THE COURT OF APPEALS' SUA SPONTE REMAND TO THE LOCAL COURTS IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN WILLINGHAM.

*Willingham* v. *Morgan* presented to this Court facts parallel to those at issue here. Willingham and Jarvis were the warden and chief medical officer of the United States Penitentiary at Leavenworth, Kansas. Morgan was a prisoner at the penitentiary when he filed suit in the Leavenworth County District Court of Kansas. Morgan alleged that Willingham and Jarvis had on several occasions inoculated him with drugs, assaulted him, and beaten him.

Willingham and Jarvis filed a petition to remove the action to the United States District Court for the District of Kansas, invoking 28 U.S.C. § 1442(a)(1), which allows removal to federal court of any civil action against "[a]ny officer of the United States . . . for any act under color of such office . . ." The federal district judge denied the prisoner's motion to remand the case to the Kansas state court and granted summary judgment to the prison officials, holding they were immune to a suit for damages under *Barr* v. *Matteo*, 360 U.S. 564 (1959).

The prisoner appealed to the Tenth Circuit, which found that the district court should have remanded to the state court. Not deciding the immunity question, the court of appeals reversed the district court and remanded the case with instructions to remand to the state courts.

This Court granted certiorari to consider whether the court of appeals had erroneously decided the removal question. The Court concluded the court of appeals had erred and reversed.

**a. This Court in Willingham Drew the "Color of Office" Test in Broad Terms.**

In reversing the appellate court in *Willingham,* this Court resolved several issues under Section 1442(a)(1) that had been particularly troubling. First, Mr. Justice Marshall, writing for a unanimous Court, set forth the test for determining whether a federal official meets the "under color of office" language of Section 1442(a)(1). The Court stated:

> Past cases have interpreted the "color of office" test to require a showing of a "causal connection" between the charged conduct and asserted official authority. *Maryland* v. *Soper* (No. 1), 270 U.S. 9, 33 (1926). "It is enough that [petitioners'] acts or [their] presence at the place in performance of [their] official duty constitute the basis, though mistaken or false, of the state prosecution." *Ibid.*

395 U.S. at 409. The Court thus held that it is sufficient to justify removal for a federal official to show that his relationship to a plaintiff derives solely from his official duties.

Applying its "color of office" test to the facts in *Willingham,* the Court found sufficient evidence to hold that the prison officials were entitled to removal. The Court stated:

> In this case, once petitioners had shown that their only contact with respondent occurred inside the penitentiary, while they were performing their duties, we believe that they had demonstrated the required "causal connection." The connection consists, simply enough, of the undisputed fact that petitioners were on duty, at their place of federal employment at all relevant times.

395 U.S. at 409

Under this Court's "color of office" test in *Willingham,* Mr. Kaplan is entitled to removal under Section 1442(a)(1). Mr. Kaplan has demonstrated the appropriate "causal connection" between his official duties and the acts of which respondents complain. As in *Willingham,* the relationship of Messrs. Pointer and Shupp to Mr. Kaplan derived only from Mr. Kaplan's performance of his duties at GSA. Any telephone conversations Mr. Kaplan may have had with Messrs. Pointer and Shupp arose strictly in the context of Mr. Kaplan's duties as a GSA labor/management specialist. But for the requirements of Mr. Kaplan's work, he would not have had occasion to speak with Messrs. Pointer and Shupp at all, nor would the claims asserted against him by Messrs. Pointer and Shupp have arisen. It is precisely this type of situation that Section 1442(a)(1) was designed to meet, and it is precisely for this type of situation that the protections of a federal forum are required in order to vindicate federal interests.

### 2. Removal Is Particularly Important in Cases in Which the Federal Official Asserts His Official Immunity, Which He Enjoys As a Matter of Federal Law.

Removal of this action to federal court effectuated the compelling policies underlying Section 1442(a)(1). As ex-

plicitly recognized by this Court in *Willingham*, removal to a federal forum is particularly appropriate in cases in which the federal official being sued asserts as a defense his immunity to suit, an immunity that arises under federal law.

In *Willingham*, the Tenth Circuit conceded that the prison officials might be protected from suit by the official immunity doctrine. But the Tenth Circuit in remanding to state court held that the "color of office" test of Section 1442(a)(1) was "much narrower" than the test for official immunity, 383 F.2d at 142, and so remanded.

Mr. Justice Marshall emphatically disagreed. He wrote:

> The federal officer removal statute is not "narrow" or "limited." *Colorado* v. *Symes*, 286 U.S. 510, 517 (1932). At the very least, it is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law. . . *In fact, one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court.* The officer need not win his case before he can have it removed. In cases like this one, Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a federal forum. This policy should not be frustrated by a narrow grudging interpretation of §1442(a)(1).

395 U.S. at 406-407 (emphasis added).

Thus this Court in *Willingham* affirmed what the District of Columbia Circuit Court of Appeals failed to recognize in Mr. Kaplan's case. One of the most important policies behind Section 1442(a)(1) is to give a federal official a federal forum in which to defend himself against charges

arising from the very nature and performance of his federal duties. Effectuation of this policy is particularly important where a federal official asserts an official immunity defense.

The appellate court in this case never mentioned the issue of Mr. Kaplan's official immunity defense which had been briefed by the parties. Nor did it consider Mr. Kaplan's assertion that whatever telephone calls he may have made to Messrs. Pointer and Shupp were made in performance of his duties as negotiator on behalf of GSA. Instead, the court of appeals remanded using the very standard rejected by this Court in *Willingham.*

**c. The Court of Appeals Erroneously Relied on Allegations in the Appellate Brief of Pointer and Shupp in Determining That the Record Supported a Remand of This Action to the Local Courts.**

In remanding this case, the court of appeals relied on representations made by Messrs. Pointer and Shupp in their appellate brief that Mr. Kaplan had acted outside the scope of his official duties in committing the acts alleged.[8]

The appellate court's approach to this issue contravenes this Court's ruling in *Willingham.* This Court noted that the prisoner in *Willingham* had asserted in his motion for remand that the prison officials were acting "on a frolic of their own which had no relevancy to their official duties as employees of officers of the United States." 395 U.S. at 407. The Court rejected this assertion as a basis for removal, holding:

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[8]From. . . the representation in appellant's [*sic*] brief that appellee's alleged liability derives from acts outside the scope of his official authority, it appears that this case was not subject to removal. . ." Court of Appeals order, June 30, 1980, Appendix B.

> If the question raised is whether [petitioners] were engaged in some kind of "frolic of their own" in relation to respondent, then they should have the opportunity to present their version of the facts to a federal, not a state, court. This is exactly what the removal statute was designed to accomplish.

395 U.S. at 409.

Messrs. Pointer and Shupp also asserted that "Appellee went off on a frolic of his own. . ." (Court of Appeals Brief for Appellants at 6). As recognized in the above quote from *Willingham,* mere allegations by a plaintiff cannot in logic determine the question of removal. If a plaintiff's allegation that a federal official acted on a frolic can determine the removal issue, then a plaintiff can always defeat removal simply by asserting that the official was acting beyond the scope of his duties. By this tactic, the plaintiff could invariably force the federal official to prove his immunity defense in state court, which is exactly what this Court said in its unanimous opinion in *Willingham* should not happen.

The proper focus for determining the appropriateness of removal, according to this Court's decision, is on the federal official's pleadings. In *Willingham,* the prison officials' sole assertion with respect to the "color of office" test was made in their motion for summary judgment. In that document, they alleged that their only contact with the prisoner occurred in the performance of their official duties. Mindful that the proper inquiry for removal must be "whether the record in this case will support a finding that respondent's suit grows out of conduct under color of office," 395 U.S. at 407, this Court held that the prison officials had established grounds for removal, even though a

separate pleading apart from the removal papers had to be consulted to reach that result.

Here the result is more directly arrived at. The complaint of Messrs. Pointer and Shupp howed on its very face that their relationship to Mr. Kaplan arose out of their mutual federal employment. (See language quoted from the complaint at Page 7, above.) Similarly, Mr. Kaplan more than adequately alleged the "causal connection" between his official duties and the acts complained of by Messrs. Pointer and Shupp. Mr. Kaplan asserted in his Petition for Removal that respondents "[seek] personal money damages for alleged acts committed by Petitioner under color of Petitioner's office as Special Assistant to the Director, Regional Executive Office, General Services Administration ["GSA"], Region 3."

Mr. Kaplan's assertion that his relationship to respondents existed only within the limits of his official duties was repeated in his brief to the United States Court of Appeals for the District of Columbia Circuit (Court of Appeals Brief for Appellee, at 28-30).

Moreover, Messrs. Pointer and Shupp have always heretofore acquiesced in Mr. Kaplan's assertion that he was acting under color of his office. In their original suit against Mr. Kaplan and the other GSA officials, Messrs. Pointer and Shupp emphatically took the position that Mr. Kaplan was acting within the scope of his official duties in connection with all telephone calls attributed to him. In the first suit in their opposition to Mr. Kaplan's Motion for Summary Judgment, at Page One, for example, counsel for Pointer and Shupp emphasized that they were ". . . suing Defendant Kaplan . . . for actions taken within the outer parameter [*sic*] of his duties as a federal employee, and while acting under color of authority." Again, at Page Three of the same pleading, counsel

reiterated that "the actions complained of by Plaintiffs . . . were taken within the outer parameter [*sic*] of Defendant Kaplan's job authority."

In addition to their express recognition that Mr. Kaplan was at all times acting within the limits of his authority, Messrs. Pointer and Shupp implicitly admitted as much in their present complaint, which refers to Mr. Kaplan exclusively as a GSA official. Moreover, Pointer and Shupp did not object to the removal petition that brought this case to the federal district court. That removal petition, as noted, was explicitly based on the fact that Mr. Kaplan was being sued for acts performed under color office as a federal official. No one ever questioned the validity of the removal in this case until the Court of Appeals raised the issue *sua sponte* in its order remanding.[9]

**d. Apart From This Case, the Lower Federal Courts Have Been Consistent in Construing the "Under Color of Office" Test Broadly Since This Court's Decision in Willingham.**

Mr. Kaplan has met this Court's criteria for removal under Section 1442(a)(1). That removal is appropriate in Mr. Kaplan's case is further demonstrated by the cases decided by the lower federal courts since *Willingham*. *Malone* v. *Longo*, 463 F.Supp. 139 (E.D.N.Y. 1979), for example, held that, under *Willingham*, a nurse employed in a Veterans Administration hospital was entitled under 28 U.S.C. § 1442(a)(1) to remove an action for defamation

[9]Messrs. Pointer and Shupp did argue vigorously in their brief in the Court of Appeals that the district judge was incorrect in holding that Mr. Kaplan was immune to suit. Their argument was based on the assertion that Mr. Kaplan forfeited his immunity by acting beyond the scope of his duties. The Court of Appeals apparently confused this argument with the "under color of office" test for removal. However, as this Court pointed out so clearly in *Willingham*, though the words are similar, the removal standard is far broader than the immunity standard.

brought against her by a co-worker. The district court stated:

> [O]ur inquiry is limited to whether plaintiff's action arises out of acts performed by defendant under color of office.
>
> The answer is simple. The phrase must be broadly construed. *Areskog* v. *United States,* 396 F.Supp. 834, 838 (D.Conn. 1975). It is sufficient therefore that defendant's objectionable contact with plaintiff occurred inside the Veterans Administration Hospital while plaintiff was performing her official duties and that the relationship between the parties derived solely from their official duties. *See Willingham* v. *Morgan,* 395 U.S. at 409. Since defendant acted under color of federal office, her right of removal is absolute. Hence, plaintiff's motion to remand is denied.

463 F. Supp. at 142. *See also Williams* v. *Williams,* 427 F.Supp. 557 (D.Md. 1976); *District of Columbia* v. *Landmark Services,* 411 F.Supp. 1002 (D.D.C. 1976); *Klein* v. *Robinson,* 328 F.Supp. 417 (E.D.N.Y. 1971), *aff'd per curiam,* 468 F.2d 619 (2d Cir. 1972). The court in *Malone* and the other federal courts cited have recognized the importance of giving federal officials a federal forum in which to defend themselves against charges arising from the performance of their official duties. Actions taken by federal officials while performing their duties are "under color of office" for removal purposes, and their propriety must be examined in federal court, when the federal official requests removal. *Willingham* v. *Morgan, supra; Malone* v. *Longo, supra; Preble* v. *Johnson,* 275 F.2d 275 (10th Cir. 1960).

**2. CONCLUSION**

The record in this case and application of the law as formulated by this Court in *Willingham* compel the conclusion that Mr. Kaplan has the right to be heard in a federal forum. The order of the Court of Appeals for the District of Columbia Circuit denying him that right conflicts with the decisions of this Court. To correct that conflict, Mr. Kaplan's petition for a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX A

## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| RILEY POINTER, *et al.*, *Plaintiff*, | ) | |
| v | ) | Filed July 13, 1973 |
| JEROME A. KAPLAN, *Defendant*. | ) | Civil Action No. 79-0939 |

### ORDER

This motion having come before the court on Defendant Kaplan's Motion for Summary Judgment on Plaintiffs' Common Law Complaint Removed from Local Court – Immunity, the court being fully apprised in the matter, and it appearing to the court that summary judgment is proper because Defendant Kaplan is immune from this lawsuit, it is this 11th day of July, 1979.

ORDERED that Defendant Kaplan's Motion for Summary Judgment on Plaintiffs' Common Law Complaint Removed from Local Court – Immunity is GRANTED, and it is

FURTHER ORDERED that this action be dismissed with prejudice.

/s/ Thomas A. Flannery

UNITED STATES DISTRICT COURT JUDGE

## APPENDIX B

**UNITED STATES COURT OF APPEALS**
**For The District of Columbia Circuit**

RILEY POINTER,
PAUL S. SHUPP,
*Appellants*

v

JEROME A. KAPLAN,
*Defendant.*

Filed June 30, 1980
Appeal No. 79-1969
Civil No. 79-0939

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

Before: McGOWAN and EDWARDS, Circuit Judges and SHIRO KASHIWA*, Judge, United States Court of Claims.

JUDGMENT

This case was taken under submission on the record, and the briefs filed by both parties. Local Rule 11(d). From the face of the record, and the representation in appellant's brief that appellee's alleged liability derives from acts outside the scope of his official authority, it appears that the case was not subject to removal from the Superior Court for the District of Columbia, *see* 28 U.S.C. § 1442(a)(1), and that the United States District Court therefore did not have jurisdiction to entertain it on removal. It is therefore

*Sitting by designation pursuant to 28 U.S.C. § 293(a).

ORDERED that the judgment of the District Court is hereby vacated; and the case remanded to the District Court with directions that it be returned to the Superior Court.

Per Curiam
For the Court

/s/ George A. Fisher
Clerk

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.